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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK ROBERT SMITH,

Defendant and Appellant.

C082380

(Super. Ct. No.
SCSC-CRF-1996-55473-2)

Defendant Mark Robert Smith appeals from an order denying his petition for a certificate of rehabilitation (Pen. Code, § 4852.01 et seq.)¹ in connection with his 1997 conviction for committing a lewd and lascivious act on a child under the age of 14 (§ 288, subd. (a)).

¹ Undesignated statutory references are to the Penal Code.

Defendant contends his statutory ineligibility for a certificate of rehabilitation denies him equal protection of the law. We find no equal protection violation and thus affirm the order of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

In 1997, defendant pleaded guilty to one count of committing a lewd act on a child under the age of 14 and was sentenced to five years of formal probation.

On February 25, 2014, defendant filed a petition in the trial court to have his felony conviction reduced to a misdemeanor. The trial court denied his petition, finding defendant was statutorily ineligible for the relief he was seeking.

On May 12, 2014, defendant filed a petition for a certificate of rehabilitation pursuant to sections 4852.01 and 4852.06. The trial court denied defendant's motion. Defendant timely appealed.

DISCUSSION

Defendant contends section 4852.01, subdivision (d), which bars section 288 offenders from obtaining certificates of rehabilitation, violates his right to equal protection because offenders convicted of violating sections 288a, subdivision (d)(2) and 286, subdivision (d)(2) are similarly situated but eligible for such relief.

In general, the denial of a petition for a certificate of rehabilitation is reviewed under an abuse of discretion standard. (See *People v. Lockwood* (1998) 66 Cal.App.4th 222, 226.) Here, however, the record does not reflect the trial court exercised its discretion in weighing evidence related to defendant's petition, but rather found defendant ineligible as a matter of law. Accordingly, our review is de novo. (See *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 632.)

Under section 4852.01, "[a] person convicted of a felony who is committed to a state prison or other institution or agency, . . . may file a petition for a certificate of rehabilitation and pardon." (§ 4852.01, subd. (a).) However, "[t]his chapter does not

apply to . . . persons convicted of a violation of . . . Section 288” (§ 4852.01, subd. (c).)

Under the plain language of section 4852.01, subdivision (c) therefore, defendant is statutorily ineligible to seek a certificate of rehabilitation as a result of his conviction under section 288, subdivision (a).

Defendant contends that section 4852.01’s provision barring a certificate of rehabilitation for a section 288 conviction violates equal protection because it allows other similarly situated persons who have violated sections 288a, subdivision (d)(2) and 286, subdivision (d)(2) to obtain a certificate. We disagree.

Section 288, subdivision (a) punishes lewd or lascivious acts by any person on the body of a child under 14 years of age done “with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.” (§ 288, subd. (a).) Section 288a, subdivision (d)(2) punishes any person who commits an act of oral copulation on a child under the age of 14, when the act is accomplished by means of force or fear. (§ 288a, subd. (d)(2).)

Section 286, subdivision (d)(2) punishes “[a]ny person who, while voluntarily acting in concert with another person, either personally or aiding and abetting that other person, commits an act of sodomy upon a victim who is under 14 years of age, when the act is accomplished against the victim’s will by means of force or fear of immediate and unlawful bodily injury on the victim or another person” (§ 286, subd. (d)(2).)

“ ‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.’ [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’ [Citation.]” (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253, italics omitted.)

Defendant's equal protection claim fails at the initial inquiry because he is not similarly situated to a person who violates either section 288a, subdivision (d)(2) or section 286, subdivision (d)(2). Section 288 contains a specific intent requirement—it punishes an act done “with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.” (§ 288, subd. (a).) Sections 288a, subdivision (d)(2) and 286, subdivision (d)(2) on the other hand are both general intent crimes. (*People v. Thornton* (1974) 11 Cal.3d 738, 765 [§§ 288a & 286 are general intent crimes], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.)

The higher mental state required for a conviction of a specific intent crime is “a distinction that is meaningful” in determining whether that defendant is similarly situated to a defendant convicted of a general intent crime. (See *People v. Cavallaro* (2009) 178 Cal.App.4th 103, 114 [discussing equal protection related to §§ 288 & 261.5].) Accordingly, defendant is not similarly situated to offenders convicted under either section 288a, subdivision (d)(2) or 286, subdivision (d)(2) because 288 contains a specific intent requirement that is not contained in either section 288a, subdivision (d)(2) or section 286, subdivision (d)(2). (See *People v. Singh* (2011) 198 Cal.App.4th 364, 371 [a § 288, subd. (a) offender “is not similarly situated to offenders convicted under section 261.5 . . . because [the latter] provision[] . . . [is a] general intent offense[]”]; see also *People v. Alvarado* (2010) 187 Cal.App.4th 72, 79 [§ 288, subd. (a) offenders are not similarly situated to § 261.5 offenders because “[a] section 261.5 offense . . . concerns the general intent offense of committing unlawful sexual intercourse”].)

In sum, persons convicted of section 288, subdivision (a) are not similarly situated to those convicted of violating either section 288a, subdivision (d)(2) or 286, subdivision (d)(2). Thus, section 288, subdivision (a) offenders are not sufficiently similar to section 288a, subdivision (d)(2) or section 286, subdivision (d)(2) offenders “to merit application of some level of scrutiny to determine whether distinctions between the [] groups justify

the unequal treatment.” (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 715.)

Accordingly, defendant’s equal protection challenge fails.

DISPOSITION

The order denying the petition for a certificate of rehabilitation is affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

HULL, J.